process nor delay Commission consideration of appeals.[38]

70. Settlement of Rate Cases. We stated in the Rate Order that the regulatory structure established by Section 623 of the Communications Act, 47 U.S.C. 543, does not appear to give cable operators the latitude to settle rate cases. Rather, a franchising authority must follow procedures that are consistent with the Commission's rate regulations and make a reasoned decision based on the record. Rate Order, *supra* at 5715, n. 337. Several cable operators argue that they should be permitted to enter into settlement agreements with franchising authorities, because such agreements would save the resources of all parties.

71. For largely the same reasons that we prohibited agreements not to regulate basic rates,[39] we affirm our intention to disallow settlement agreements that are based on factors outside the record of a rate proceeding. Permitting such settlements could potentially allow franchising authorities to bargain away subscribers' statutory protection against unreasonable rates. Furthermore, the availability of settlements could increase the number of cost-of-service showings, which would be more suited to negotiated resolutions. Parties in a rate-setting procedure may, of course, stipulate to particular facts and even the final rate level itself, as long as the basis for each such stipulation is clearly articulated, there is some support for each stipulation in the record, and it does not circumvent our rate regulations.

72. Effective Date of Rate Increases. In the Rate Order, we noted that unless the franchising authority finds that a proposed increase in basic tier rates is unreasonable, the increase will go into effect 30 days after filing with the franchising authority. If the franchising authority is unable to determine whether the proposed rate increase is reasonable, or if the cable operator has submitted a cost-of-service showing seeking to justify a rate above the presumptively reasonable level, the franchising authority may delay the effective date of the proposed rate for 90 days, or 150 days, respectively. Rate Order, *supra* at 5709; 47 C.F.R. 76.930.[40] Viacom now requests modification of our rules to allow a reviewing authority that is unable to determine whether a particular portion of a proposed rate increase is reasonable to permit those portions of the rate increase it finds reasonable to go into effect immediately. Viacom argues that delays in the approval of new increases limit the operator's ability to recover its full costs.

73. We find that where the questionable portion is clearly severable, a franchising authority may, at its discretion, permit the implementation of portions of a rate increase it finds reasonable while it reviews the reasonableness of other portions. This policy will permit cable operators to recoup as promptly as possible those costs that are deemed

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[38] We will classify appeals of local rate decisions as restricted proceedings for purposes of our *ex parte* rules. Accordingly, *ex parte* presentations are prohibited. See 47 C.F.R. § 1.1208 (1992).

[39] First Rates Reconsideration, *supra,* at para. 72.

[40] To toll the effective date of the proposed rate, the franchising authority must issue a brief order, within the initial 30-day period, explaining that it needs additional time to review the proposed rate. Id.

acceptable by the franchising authority.

74. Proprietary Information. In the Rate Order, we stated that franchising authorities will have the right to collect additional information -- including proprietary information -- to make a rate determination in those cases where cable operators have submitted initial rates or have proposed increases that exceed the Commission's presumptively reasonable level. Rate Order *supra* at 5718-19. We also required franchising authorities to adopt procedures analogous to those contained in Section 0.459 of the Commission's Rules.[41] Id., n. 349. See 47 C.F.R. § 76.938.

75. King County requests that the Commission clarify whether the requirement that they adopt procedures "analogous" to Section 0.459 permits them to follow the corresponding state or local freedom of information, open records, and other sunshine-type laws, or whether the Commission intended Section 0.459 to preempt all state and local laws governing access to information. They are concerned that cable operators may choose not to submit confidential business information requested by the franchising authority if they believe it is not protected under the state or local law, whose exemptions may differ from those of the federal Freedom of Information Act. Michigan C-TEC Communities also points out that the city itself could be subject to attorney's fees under some state access laws under Section 623(a)(4)(A), 47 U.S.C. § 543(a)(4)(A). Michigan C-TEC Communities also fears that cable operators could use the inconsistent state and local access laws to argue that the franchising authority's certification is invalid under Section 623(a)(4)(A). Time Warner argues that Section 623(b)(2)(A), which directs the Commission to prescribe regulations that reduce administrative burdens on the parties, supports the adoption of a single standard to govern the protection of proprietary information.

76. With respect to the franchising authority's right of access to the cable operator's confidential business records, Booth American Company requests that we reconcile a perceived inconsistency between the Rate Order and the rule. It asks us to clarify whether the franchising authority can request proprietary information only in reviewing a cost-of-service showing (as the petitioner believes the Rate Order implies) or in all rate cases. Petitioner argues that, according to the Rate Order, the right to proprietary information arises where the rates in question already "exceed the Commission's presumptively reasonable level," which petitioner interprets to refer only to cost-of-service showings. Rate Order, *supra* at 5718. The text of the rule itself, however, according to petitioner, specifically allows the franchising authority to request such information "to make a rate determination," which would presumably allow franchising authorities to request such information for proceedings to apply the competitive differential, as well as cost-of-service proceedings. 47 U.S.C. § 76.938. NATOA opposes the suggestion that franchising authorities may

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[41] Section 0.459 provides that a party submitting information may request confidentiality with respect to specific portions of the material submitted. The party must make a showing, by a preponderance of the evidence, that non-disclosure is consistent with Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552, which authorizes the Commission to withhold from public disclosure confidential commercial or financial information.

request such information only with respect to cost-of-service showings and argues that Section 623(g) gives franchising authorities clear access to necessary information to administer the statute in all proceedings.

77. Petitioners raise two distinct issues, one relating to the franchising authority's access to the cable operator's confidential business records in making a rate determination, the other relating to the scope of the franchising authority's obligations regarding public disclosure of the operator's proprietary information after it is submitted. With respect to the first issue, we find that franchising authorities and the parties to a rate proceeding must have access to the information upon which the rate justification is based. Such access is essential to permit the franchising authority to make an informed evaluation, based on complete information, of the reasonableness of the rate in question. Parties participating in the rate proceeding must have access to proprietary information submitted to the franchising authority in order to evaluate the arguments advanced by the cable operator and to help focus the issues. Without such access, franchising authorities may be frustrated in their attempts to set reasonable rates. See 47 U.S.C. § 543(b). With respect to any arguable inconsistency between the text of the Rate Order and the rule itself, we clarify that franchising authorities are entitled to request information, including proprietary information, that is reasonably necessary to make a rate determination, whether pursuant to a cost-of-service showing or when applying the competitive differential, as clearly stated in the text of the final rule adopted. 47 C.F.R. § 76.938. Each request should state clearly the reason the information is needed, and where related to an FCC Form 393 (and/or FCC Form 1200/1205), indicate the question or section of the form to which the request specifically relates. This specificity will enable franchising authorities to ensure the validity of the information provided in order to arrive at a determination of the reasonableness of the rates proposed, while at the same time ensuring that cable operators are not required to provide additional data that is not germane to the rate-setting process. This interpretation is consistent with Section 623(g) of the Act, which requires cable operators to file with franchising authorities financial information "as may be needed for purposes of administering and enforcing this section." 47 U.S.C. § 543(g).

78. This right of access is limited to that information necessary to support the elements of the particular rate justification at issue, and extends to the franchising authority and, in appropriate circumstances, to the actual parties to a rate proceeding.[42] Section 76.938 governs such access and, to the extent that any state or local laws provide for more limited access to information than the federal rule, they are accordingly preempted. As a general matter, we have the authority to preempt state or local laws that are inconsistent with federal law and regulations. City of New York v. FCC, 486 U.S. 57, 64 (1988); Fidelity Federal Savings and Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982) (the statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof). It was never our intention to allow cable operators to use any state or local law to withhold business information it would otherwise

[42] Franchising authorities should, in appropriate circumstances, adopt procedures or craft protective agreements to ensure that proprietary information is not disclosed publicly by the parties.

have to produce under the federal rule. State or local laws that conflict with the federal right of access embodied in our rule would frustrate the purpose of the rule -- that is, to permit the franchising authority to make an informed evaluation of the rate in question so as to ensure the reasonableness of basic tier rates as required by Section 623(b) of the Act. Preemption is therefore permitted and necessary.

79. With respect to the public disclosure issue, we find on further reflection that we should not require franchising authorities to adopt procedures that mirror Section 0.459, although they may do so in their discretion. We find it neither necessary nor desirable to preempt state and local laws governing access to information. Rate regulation of basic cable services has been designated by the Congress and this Commission as an essentially local matter, and it involves local businesses providing local services. Local (including state) governments have instituted access laws to govern the confidentiality of the business information of the business entities in their respective jurisdictions as they have seen fit for their particular circumstances and interests. We see no justification sufficiently compelling to override that prerogative. Additionally, as one municipality points out, many state utility commissions are subject to the same state laws as franchising authorities, many of which differ from the federal FOIA, and "there is no good reason why claimed proprietary information of a cable operator should be treated differently than comparable information of another regulated entity."[43] Moreover, requiring adoption of local rules that would implement Commission access rules would invoke this agency's oversight by review of all local access decisions. Such a situation could hopelessly paralyze the local rate-setting proceedings throughout the country. While we acknowledge that consistent treatment of the public's access to proprietary information could lessen the burden in some cases for some multiple system operators whose systems may be subject to varying disclosure laws in different jurisdictions, this possibility is outweighed by the other considerations just cited. Thus, while as a general matter we believe franchising authorities should consider the interests of cable operators in protecting proprietary information, we now conclude that franchising authorities should proceed in accordance with applicable local and state law rather than mandating the adoption of procedures analogous to our rules. We therefore amend Section 76.938 accordingly.

80. Forfeitures and fines. To the extent that franchising authorities may be concerned with the enforcement of their own orders, decisions, and requests for information, we clarify that if a franchising authority has the power under state or local law to impose forfeitures or fines for violations of its rules, orders, or decisions, including filing deadlines and orders to provide information, we see nothing in the Cable Act or our rules which would prevent the franchising authority from taking such action.[44] A franchising authority would be free to report to us any apparent violation of our rules, and, should we determine that a violation

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[43] Petition of Michigan C-TEC Communities at 10.

[44] See 47 C.F.R. § 76.943. As stated in the regulation, however, a franchising authority may not impose a forfeiture or fine simply because an operator's rates are unreasonable.

has in fact occurred, we could take appropriate enforcement action.[45] In addition, we are modifying our rules to require cable operators to respond to franchising authorities' reasonable requests for information, as well as our own such requests.[46]

81. Franchising authority discretion. We also take this opportunity to reiterate our general philosophy regarding rate proceedings before franchising authorities. Congress generally allocated to franchising authorities responsibility for reviewing basic service rates under the Act. While we have set out the general rules for regulation, we have not attempted, nor could we address, every detail of the rate regulation process. A certain amount of latitude has been left to franchising authorities. As we stated in the Rate Order, we will not review decisions of franchising authorities *de novo*, but rather will sustain their decisions as long as there is a reasonable basis for those decisions. Id. at 5731. This standard of review will apply as well with respect to franchising authority interpretations of any ambiguities in evaluating the responses or information provided on the FCC Form 393 (and/or FCC Forms 1200/1205) or in a cost-of-service showing.

C. FCC Form 393 (FCC Forms 1200/1205) Issues/Failure to File.

82. Failure to file rate justification. Under our rules, a cable operator has the burden of proving that its rates for regulated cable services are in compliance with the law.[47] It must justify its rates within 30 days of either (1) receiving notification from a franchising authority that it is commencing regulation of basic service rates or (2) the service date of a complaint regarding the reasonableness of cable programming service tier rates.[48] An operator justifies its rates by submitting its rate schedule and by also filing a completed FCC Form 393 (and/or FCC Forms 1200/1205), or a cost-of-service showing.

83. Our rules regarding regulated cable programming service tiers explicitly provide that if a cable operator fails to file and serve a rate justification as required, we may deem the operator in default and enter an order finding the operator's rates unreasonable and mandating appropriate relief.[49] However, the rules do not explicitly provide parallel remedies where an operator fails to timely justify its rates for the basic service tier.

84. On our own motion, we hereby correct the oversight. An operator that does not attempt to demonstrate the reasonableness of its rates has failed to carry its burden of proof. We are therefore amending our rules to make clear that authorities regulating basic service rates have authority to deem a non-responsive operator in default and enter an order finding

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[45] See Communications Act, § 503, 47 U.S.C. § 503; 47 C.F.R. §§ 76.943, 76.963.

[46] See 47 C.F.R. § 76.943 (as modified).

[47] 47 C.F.R. §§ 76.937, 76.956(b).

[48] 47 C.F.R. §§ 76.930, 76.956(a).

[49] 47 C.F.R. § 76.956(e).

the operator's rates unreasonable and mandating appropriate relief. This relief could include, for example, ordering a prospective rate reduction and a refund. Such a refund would be based on the best information available at the time. We note, however, that in the Second Order on Reconsideration, we establish certain adjustments to the timeframes set out in Sections 76.930 and 76.933 due to the transition from existing rules to the rules we establish today. A franchising authority will not be permitted to find in default a cable operator that files its rate justification in accordance with the scheme set forth in the Second Order on Reconsideration at paras. _____.

85. We believe that rate regulators must have this authority to allow them to deal swiftly and effectively with non-compliant operators. Otherwise, non-compliant operators could subvert the regulatory system we have set in place to ensure reasonable rates. Of course, such remedial power is not unbounded and must be exercised reasonably.[50] It should not be exercised in a case of a *de minimis* failure on the part of the cable operator to respond. We do not mean to countenance over-zealous behavior by franchising authorities. Rather, we wish to make clear that franchising authorities have this power to deal with operators who ignore their legal obligations.[51]

86. Deficient rate justifications; additional information. Our early experience with FCC Form 393 rate justifications has also revealed instances where cable operators have apparently filed justifications that are incomplete in various respects, or that require clarification or substantiation. We will here outline how such filings should be treated.

87. We have considered various options for resolving these problems, including declaring that an incomplete filing may be rejected automatically and treated as a non-filing. However, this would produce an unduly harsh result for cable operators, especially small system operators, who have filed in good faith but have for some reason left a portion of their filing incomplete or unclear. We therefore adopt a more moderate approach that will present cable operators with an opportunity to cure defects in their filings or supply additional information as necessary.

88. In the event a cable operator files a facially incomplete rate justification, *viz.*, fails to complete the form or fails to include supporting information called for by the form, the franchising authority or the Commission may order the cable operator to file supplemental information. While the franchising authority is waiting to receive this information from the cable operator, the deadlines for the franchising authority to rule on the reasonableness of the

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[50] For example, we do not believe that it would be reasonable for a franchising authority to declare rates unreasonable and order a prospective rate reduction and refunds if an operator filed a completed FCC Form 393 (and/or FCC Form 1200/1205) on the 31st day after receiving notice of regulation from the franchising authority.

[51] We reiterate here that in any Commission review on appeal of a franchising authority's rate determination, we will not conduct a *de novo* review. Rather, we will affirm the decision if we find that the franchising authority has provided a reasonable basis in its written decision for the action it has taken in response to the cable operator's noncompliance. Rate Order, *supra*, at 5731.

proposed rates are tolled.[52]

89. We distinguish an incomplete filing (for example, a form filed without a required explanation) from one which is complete and submitted in good faith, but about which the regulating authority has certain questions or reasonably feels it requires clarifying or substantiating information. As we confirm in paragraphs 74-77, *supra*, the regulatory authority in such a situation has the right to request and receive clarifying or substantiating information. However, we will not automatically toll the deadlines for franchising authorities to act in these circumstances, as we do for incomplete filings. If the information sought, however, is of such significance as to delay examination of the rest of the rate justification, or if the operator fails to supply the information promptly, the franchising authority could be justified in delaying its ruling accordingly.

90. In either case, it is obviously necessary for the franchising authority or the Commission to set reasonable deadlines for the submission of supplemental information in order to avoid delaying for consumers the benefits of rate regulation. [53] If the cable operator fails to provide the requested information within the required time or fails to provide complete information in good faith, the franchising authority or the Commission may then hold the cable operator in default and mandate appropriate sanctions as discussed elsewhere in this section, as if the operator failed to submit a response at all. We again emphasize that such authority must be exercised in a reasonable manner.

91. We take this opportunity to re-emphasize that any and all information submitted as part of the rate-setting process must be truthful in all respects, just as any information must be truthful when supplied in a Commission proceeding. Misrepresentation or willful concealment of any relevant matter in a rate proceeding may result in, among other things, Commission-ordered forfeitures and/or the denial of renewal or revocation of any Commission license held by the offending cable operator.

92. Finally, in order to assist the Commission and franchising authorities in verifying information contained in rate filings, cable operators filing after the effective date of our revised rules must include rate cards and channel line-ups along with their benchmark or cost-of-service filings. If there is any difference between the numbers on these documents and the numbers in the rate filing, the cable operator must attach an explanation. Rate cards and channel line-ups must be included for September 30, 1992, September 1, 1993, and for the rates being reviewed.

93. Updating rate calculations. We now turn to the issue that arises for numerous

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[52] Once the supplemental information has been served on the franchising authority, the time for determining the reasonableness of the rate by the franchising authority will recommence.

[53] Supporting information that is called for in the FCC Form 393 (and/or FCC Forms 1200/1205) should have been submitted with the form, and could reasonably be demanded within a short period of time.

operators that promptly revised their rates in response to our rules, based on rate-setting facts in existence at the time of the revisions.[54] These operators have not been required to justify those rates until recently, however, and several months after the revisions, some of the facts or data on which the rate-setting is based may have changed.[55] For example, tentative inflation adjustments have since become definite, equipment costs may have varied, or channels may have been added. We share National Cable Television Association's concern that rates adopted in an effort to comply with our rules as quickly as possible may become unreasonable solely as a result of using later data to refresh the calculations. Operators should not be penalized for making good faith attempts to comply with our rules in a timely manner. In addition, if the cable operators are required to revise their rates immediately based on refreshed data, the changes will result in significant administrative expenses to the operators and confusion for subscribers. In most cases, we expect the resulting rate change would be minimal and would be in effect only until the cable operator seeks a rate change. At the same time, it is important that regulatory authorities are able to verify accurately the reasonableness of a current rate, and to avoid compounding any inaccuracies as subsequent rate increases are introduced, which are a function of the level of initial rates.

94. Accordingly, we will require the following actions when different rates are dictated by data used in initial rate-setting than by data current as of the time an FCC Form 393 (and/or FCC Forms 1200/1205) is actually submitted to the franchising authority or the Commission. When current rates are accurately justified by analysis using the old data (and that data was accurate at the time), cable operators will not be required to change their rates. In these circumstances, however, when such operators make any subsequent changes in their rates (such as when seeking their annual inflation increase), those changes must be made from rates levels derived from the updated information.[56] When current rates are <u>not</u> justified by analysis using the old data (so that a rate adjustment would be necessary in any event), cable operators will be required to correct their rates pursuant to current data. In these circumstances, the resulting rates must be based on current data.[57]

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[54] This issue was raised by the National Cable Television Association in its November 29, 1993 *ex parte* filing with the Commission concerning practical problems with FCC Form 393 Instructions. This issue was also discussed in Continental Cablevision's *Emergency Petition for Reconsideration of "Questions and Answers" of November 10,* filed with the Commission on November 15, 1993.

[55] The same problem could arise any time rates are established at one point in time but subject to justification as of a later date.

[56] We take this action on the assumption that any rate differentiation based on old and current data is quite small, so that the harm to consumers is small compared to the negative effects discussed above. In a particular case where this is not so, the franchising authority can petition for a waiver of our rules to impose an immediate rate reduction using current data.

[57] In any case, the franchising authority retains the discretion to permit retention of an established rate that is close to, but not exactly, the rate justified by the benchmark system, with a corresponding reduction taken from the next rate increase, in order to reduce rate churn, if it determines that this best serves the interests of the cable subscribers within its jurisdiction.

95. Computer-generated forms. Many cable operators have filed their rate justifications on various substitute versions of FCC Form 393, often computer-generated. Indeed, our November 10, 1993 Public Notice specifically contemplated such substitutes, provided "the form is *identical* in overall appearance and format to FCC Form 393" (emphasis added). Unfortunately, our initial review of such filings has revealed a wide variety of substitute forms, none of which appears to be "identical in overall appearance and format to FCC Form 393."

96. Given the variations in these forms as filed and the difficulty in verifying their conformance to the official FCC Form 393, we conclude that the burden on franchising authorities and on the Commission of processing such non-standard forms would be substantial. If each cable operator submitted its own version of FCC Form 393, it would be virtually impossible to establish any uniform system of review or to verify the accuracy of the filings with any degree of certainty.

97. We therefore decide that such substitute forms are unacceptable. All rate filings must be made on an actual FCC Form 393, (and/or FCC Forms 1200/1205), a copy of the actual form, or a copy generated by Commission software. The burden on cable operators to use the Commission's form is small, since they may generate the data in whatever form they wish and simply transfer it to the official form. By contrast, this requirement should significantly reduce the processing burden and increase the accuracy of review by regulatory authorities and other interested parties.

98. Accordingly, any future rate filing not made on an official FCC Form 393 (and/or FCC Forms 1200/1205), a copy of the form, or a copy generated by Commission software, shall be deemed not to have been filed, and appropriate sanctions for failure to file may be imposed. For example, under appropriate circumstances, regulatory authorities may treat non-complying forms as patently defective, thus not requiring an opportunity to cure the defect as would be the case for a filing that is merely incomplete. Obviously, this sanction should not be imposed where an operator has made a good faith effort to comply with our rules. If a cable operator has made a rate filing on a non-FCC form prior to the effective date of these rules, the franchising authority may order that the form be re-filed within 14 days. The cable operator shall then have 14 days to submit its rate filing on an FCC Form 393 (and/or FCC Forms 1200/1205), during which time the deadline for the cable authority to rule on the reasonableness of the rates shall be tolled. Although we considered deeming non-standard forms already filed acceptable, we believe the administrative burden of attempting to implement the rules based on non-complying forms is unacceptable. We hereby order all cable operators who have filed benchmark showings with us on a non-FCC form to refile within 14 days of the effective date of this Order. Furthermore, any benchmark showing that comes to the Commission on appeal must be on an official FCC Form 393 (and/or FCC Forms 1200/1205), a copy of the form, or copy generated by Commission software.

D. Refund Issues.

99. Commission Authority to Allow Franchising Authority to Order Refunds on Basic Tier Rates. We stated in the April 1993 Rate Order that refunds are available with respect to basic tier service pursuant to our authority under Sections 623(b) and 4(i) of the Communications Act, 47 U.S.C. §§ 543(b), 154(i). We determined that the Communications Act's explicit reference to refund authority with respect to cable programming service tier service should not be construed to bar refunds of unreasonable basic tier rates. Rate Order, *supra* at 5725. We noted that Section 623(b)(5)(A), 47 U.S.C. 543(b)(5)(A), grants wide discretion to adopt procedures so that franchising authorities can enforce reasonable rates.

100. The National Cable Television Association, Time Warner, and the Arizona Cable Television Association argue that the Communications Act does not give the Commission the authority to order refunds for the basic tier services. They note that Section 623(a)(1), 47 U.S.C. 543(a)(1), provides that "[n]o federal agency or state may regulate the rates for the provision of cable service except to the extent provided" under the statute. They also repeat the argument that, although Congress specifically authorized refunds for cable programming tier services, it did not provide a parallel authorization for basic tier service. Petitioners contend that the Commission has violated the principle of statutory construction that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[58]

101. Petitioners' argument ignores the breadth of the Commission's mandate and authority in this area. As we noted in the Rate Order, Section 623(b)(1), 47 U.S.C. 543(b)(1), gives the Commission broad rulemaking power to "ensure that the rates for the basic service tier are reasonable" and to "protect[] subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition." Moreover, Section 623(b)(5) directs the Commission to adopt procedures by which "franchising authorities may enforce the [rate] regulations prescribed by the Commission... ." Section 623(b)(5) thus grants the Commission wide discretion to craft procedures governing the enforcement of its overall regulatory regime with respect to basic tier rates. Finally, Section 4(i) of the Communications Act, 47 U.S.C. 154(i), expressly authorizes the Commission to issue orders "not inconsistent with this Act, as may be necessary in the execution of its functions." Requiring cable operators to return to subscribers unreasonable basic tier charges effectuates the express requirements of Section 623(b) and is fully within the Commission's authority.[59]

102. The fact that Section 623(b) does not mirror the remedial procedures in Section 623(c), which governs cable programming service tier rate complaints and contains an

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[58] Russello v. United States, 464 U.S. 16, 23 (1983) (explaining the principle of *expressio unius est exclusio alterius*).

[59] It is also in accord with the Conference Report accompanying the Commission's 1993 supplemental appropriation to implement the 1992 Cable Act, as discussed *infra* in para. 108.

express provision for refunds, does not change our conclusion. In New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101 (D.C. Cir. 1987), cert. denied, 490 U.S. 1039 (1989), the court held that, pursuant to Section 4(i), the Commission may require carriers to refund earnings in excess of a Commission-prescribed authorized rate-of-return even though refunds are not expressly authorized, and even though another part of Title II of the Communications Act expressly permits an award of damages against carriers for other types of violations. Thus, the mere fact that Section 623(c) provides for refunds in the upper tier context does not persuade us that the Commission's authority under Section 4(i), in conjunction with its rulemaking power under Section 623(b), is not broad enough to permit the Commission to adopt rules providing for refunds with respect to basic tier rates. This is especially true when refunds are necessary in order to achieve compliance with Section 623(b)'s directive that the Commission shall "ensure that rates for the basic service tier are reasonable." We thus conclude again that we may permit refunds for unreasonable basic tier rates to enforce the provisions of Section 623(b) pursuant to our authority under Sections 623(b)(1), (b)(5), and 4(i) of the Communications Act.[60]

103. Refund Computations. Another issue which we need to address is that of refund computations for bundled charges. Our rules state that a franchising authority "may order a cable operator to refund to subscribers that portion of previously paid rates determined to be in excess of the permitted tier charge or above the actual cost of equipment . . . ."[61] Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates.

104. We conclude that the refund liability should be calculated based on the difference between the old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s). The intent of the refund mechanism is to place subscribers in the same position they would be had they been subject to "reasonable" rates. To not allow cable operators to factor in equipment charges could result in an operator being

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[60] As an additional matter, Viacom argues that because the size of the refund, the nature of subscriber records, and the extent of customer turnover may differ from system to system, cable operators should be given the flexibility to determine how to distribute refunds. This issue was fully considered and addressed in the Rate Order, where we encouraged cable operators, with respect to both upper and basic tier service, to identify the actual subscribers who are owed refunds, if such a procedure can be accomplished without unreasonable burden, and refund the overage either through direct payment or as a credit to the subscribers' bills. Id. at 5727 n.378; 5866 *et. seq.* It is not clear what new issue or argument petitioner is attempting to raise. We believe that Rate Order provides sufficient flexibility for cable operators to give refunds in a variety of appropriate fashions, depending on the circumstances. Recognizing that identifying individual refund recipients may be difficult, we gave cable operators the option of granting a prospective percentage reduction to cover the cumulative overcharge. This reduction would be reflected in a one-time credit on prospective bills to the class of subscribers that had been unjustly charged or, to the extent an overcharge is associated with a separately priced tier of service, refunds should be made to the class of subscribers who receive that service.

[61] 47 C.F.R. § 76.942(a).

required to make a rate reduction that is greater than the maximum reduction required under application of the benchmark approach. This analysis is consistent with our earlier statement that "the cable operator must make prospective billing adjustments to refund overcharges (and offset any undercharges) in a reasonable manner" (emphasis supplied).[62] This analysis also applies to unbundled charges where an operator was charging separately for program services and equipment but the rates did not comply with our rules (because, for example, the equipment rates were higher than actual cost). In this situation, the operator's overall refund liability will be calculated by adding the old charges together and comparing the total with the sum of the new, unbundled program service and equipment charges.

105. Refunds as Affecting Franchise Fee Liability. Section 622(b) of the Communications Act provides that "[f]or any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed five percent of such cable operator's gross revenues derived in such period from the operation of the cable system." 47 U.S.C. § 542(b). Booth American Company notes that when a refund is ordered, a cable operator's gross revenue has been reduced, and that its franchise fee should be reduced proportionately. Petitioners request that the Commission modify its regulations to provide that any amount over the percentage of gross revenues that represents the franchise fee, calculated without including the amount of the refunds, should be returned to the cable operator.

106. We will grant petitioners' request, and amend Section 76.942 accordingly. To the extent that a franchise fee is calculated as a percentage of the cable operator's gross revenues and those revenues are reduced on account of refunds, the franchising authority must promptly return to the cable operator the amount that was overpaid as a result of the cable operator's newly-diminished gross revenues.[63]

107. Calculation of Refunds on Basic Rates. In the Rate Order and in subsequent orders addressing the effective date of rate regulation,[64] we indicated that cable systems would be subject to potential refund liability for the basic service tier as of the effective date of our rules, which we ultimately determined to be September 1, 1993. See *e.g.*, Rate

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[62] Order in MM Docket No. 92-266 (released July 27, 1993), 58 F.R. 41042, 41044 n.21 (Aug. 2, 1993) (discussing this issue in the context of cable operators not being able to adjust their rates in time when the effective date of regulation was moved from October 1, 1993 to September 1, 1993).

[63] With respect to money that constitutes a franchise fee overcharge resulting from a refund to subscribers pursuant to a rate-setting procedure, and thus owed by a franchising authority to a cable operator, the cable operator may deduct the amount from future franchise fees, rather than have the franchising authority return it in one immediate lump sum payment.

[64] As we have explained before, administrative difficulties necessitated deferral of the original June 21, 1993, effective date for rate regulation to September 1, 1993. See Order in MM Docket No. 92-266, FCC 93-304, released June 15, 1993, 58 F.R. 33560 (June 18, 1993); Order in MM Docket No. 92-266, FCC 93-372, released July 27, 1993, 58 F.R. 41042 (August 2, 1993). In all of these orders, we made clear that refund liability would begin as of the effective date of the rules.

Order, *supra* at 5725, 26.[65] On reconsideration, some municipalities argue that refund liability for the basic service tier should extend back to the effective date of the rules we announced originally, June 21, 1993. They contend that an extended refund period is more consistent with the intent of Congress and is more beneficial to consumers.

108. We decline to extend the refund liability for the basic service tier back to June 21, 1993, for several reasons. First, as a legal matter, we doubt that we may extend cable operators' refund liability back to a date before the rate regulations became effective. Operators at that time were not governed by any formal authority that would have defined their regulatory obligations (*i.e.*, including any recordkeeping or administrative matters that would facilitate the refund process).[66] Second, as a practical matter, setting the refund liability date at a date 2 1/2 months prior to the effective date of the rules would present significant recordkeeping and administrative problems that make the approach unworkable. Third, we believe our decision to adopt a September 1, 1993, date for refund liability satisfies the intent of Congress, which was most recently expressed in the Conference Report accompanying the Commission's 1993 supplemental appropriation to implement the 1992 Cable Act. Specifically, the Conference Report stated:

> [T]he conferees intend that the Commission shall establish a date as soon as possible after enactment of this Act, but that date shall be no later than September 1, 1993, as the date from which consumers may obtain refunds of excessive rates for the basic service tier of cable television service and for cable programming services.[67]

Thus, a September 1 refund date was clearly contemplated as reasonable by Congress.

109. Therefore, we will maintain September 1 as the earliest date for refund liability to begin. We also note that by our advancement of refund liability from October 1, 1993, to September 1, 1993, in conjunction with our adoption of that earlier effective date for our rules, consumers will realize greater savings through refunds to an earlier time than the municipalities contemplated when filing their petitions. Any refund liability for this period will be based, of

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[65] Our rules provide that an operator's liability for refunds for basic tier rates is limited to a one-year period, except in cases where an operator fails to comply with a valid rate order issued by a franchising authority or the Commission. In such cases, the operator can be held liable for refunds commencing from the effective date of the order until such time as the operator complies with the order. In all other cases, the refund period shall run as follows: (1) from the date the operator implements a prospective rate reduction back in time to the effective date of the rules, or one year, whichever is shorter; or (2) from the date a franchising authority issues an accounting order, and ending on the date the operator implements a prospective rate reduction ordered by a franchising authority, then back in time from the date of the accounting order to the effective date of the rules, or one year, whichever is sooner. See 47 C.F.R. § 76.942 (b) and (c). The effect of these provisions is that refund liability cannot extend back before the effective date of our rate rules.

[66] See generally Bowen v. Georgetown University Hospital, 488 U.S. 468 (1988).

[67] House Report at 40.

course, on the rate-setting rules and formulas in effect at that time. The new rate-setting rules adopted in the companion Second Order on Reconsideration will be applied prospectively only. The new rules will determine future rates and refund liability only after the effective date of those rules.

110. Calculation of Refunds on Cable Programming Service Complaints. Section 623(c)(1)(C) of the Communications Act, 47 U.S.C. 543(c)(1)(C), requires the Commission to establish procedures (1) to reduce rates for upper tier services that the Commission determines to be unreasonable and (2) to refund overcharges paid by subscribers after the filing of a complaint that the Commission determines to have merit. In the Rate Order, we established that under our refund procedures the cumulative refund due subscribers would be calculated from the date a valid complaint is filed until the date a cable operator implements the reduced rate prospectively in bills to subscribers. Id. at 5865.[68]

111. On reconsideration, Time Warner requests that we revise our cable programming services refund procedures to impose a one-year limitation similar to the time restriction imposed on basic rate refunds. Thus, under Time Warner's proposal, a cable operator would be liable for refunds on initial rates from the date the complaint is filed until the Commission's decision ordering the refund, or for a one-year period prior to that decision, whichever is shorter. Additionally, Time-Warner seeks a six-month time limit on refund liability pursuant to a complaint on rate increases.

112. Time Warner argues that under the existing approach cable operators could face contingent liability for refunds for an unreasonably long period because the Commission could take years to resolve rate complaints. According to Time Warner, no matter what the final outcome of a complaint, this contingent liability will adversely affect the cable operator's ability to secure or maintain financing arrangements. Time Warner asserts that lenders are less likely to fund cable operators, or may require additional security and/or a higher rate of interest, if the operator faces potential refund liability that could languish for years at the Commission.

113. Furthermore, Time Warner believes, consumers would benefit from the Commission imposing a time limit on cable programming service tier refund liability. Such a limit, states Time Warner, would encourage the Commission to resolve rate complaints on a more timely basis, thus providing quicker relief for subscribers than under the current rules. Time Warner contends that timely resolution of refund claims would also reduce the operator's administrative burden of locating subscribers, which furthers the Commission's preferred remedy of granting a direct refund to those subscribers affected by the unreasonable rates.

114. We will not adopt a time limit on refund liability for unreasonable cable programming service tier rates. We believe our refund procedures for the cable programming

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[68] We further provided that refunds would include interest computed at applicable rates published by the Internal Revenue Service for tax refunds and additional tax payments. Also, interest would accrue from the date a valid complaint is filed until the refund issues. Rate Order, *supra*, at 5867. See also 47 C.F.R. § 76.961(a)-(d).

service tier accurately reflect the mandate of Congress, which is to reimburse subscribers for unreasonable rate payments that occur while a complaint is pending before the Commission. Specifically, the Act directs the Commission to establish procedures to be used "to refund such portion of the rates or charges that were paid by subscribers after the filing of such complaint and that are determined to be unreasonable." See 47 U.S.C. § 543(c)(1)(C) (emphasis added). Additionally, in the House Report, Congress explained that this subsection "ensures the consumer's right to a refund for unreasonable rate payments between the filing of a rate complaint and the determination that the rate is unreasonable." House Report at 88. That explicit statutory authority and legislative history indicates that Congress did not contemplate placing a cap or time limit on cable programming service refund liability. Indeed, Congress clearly intended that consumers be made whole for the charging of unreasonable cable programming services rates during the pendency of the complaint.

115. We are also unpersuaded that the amount of contingent liability cable operators might face as a result of pending cable programming service rate complaints will seriously harm the industry's ability to raise capital and borrow money. Time-Warner has not shown how outstanding contingent liabilities in specific situations have actually stymied the ability of any cable operator to attract investors or obtain capital, and has not convinced us that the degree of contingent liability potentially involved in such cases is more burdensome or problematic than that which it faces in other contexts.[69]

116. As for influencing the disposition of rate cases before the Commission, we intend to devote substantial resources to disposing of rate cases as promptly as possible, irrespective of any external time constraints. Imposition of such a limit would unfairly deprive consumers of their full rights in those cases which might defy prompt resolution by us. While it is indeed desirable to grant refunds to the parties overcharged, operators' difficulty in so doing after one year is not sufficient reason to deprive the majority of customers of any refunds due to the operators' overcharging for cable service and to permit the operator to keep the proceeds of such overcharging.

117. We note also that our rationale for adopting a one-year cap on a cable operator's refund liability for the basic service tier does not support adoption of similar limit in the cable programming services refund context. We adopted a one-year limit in the basic service context because franchising authorities might not assert jurisdiction over rates, or even seek certification, until some time in the future. Cable operators cannot reasonably be exposed to refund liability for an indefinite period that could last up to several years and cover a period during which the franchising authority saw no need to regulate rates and the operator need not have anticipated oversight of its uncontested rates or the need to justify them at a later date. Franchising authorities must assume some measure of responsibility for prompt action to assert jurisdiction over rates they believe may be unreasonable. Moreover, the calculations themselves would get extremely complex and burdensome as unregulated rate changes begin to accrue over any period

[69] For example, cable systems must regularly face contingent liabilities that result from pending lawsuits. Such liabilities can obviously remain outstanding for years until they are finally resolved through litigation.

greater than a year. Any refunds of cable programming service tier rates, however, will date back to a date certain, from which time the cable operator was explicitly advised that its rates were under regulatory scrutiny. Moreover, the refund liability period will be limited, effectively, to the time period of the rate proceeding itself, and any shorter refund liability would provide an incentive for cable operators to unduly complicate, or otherwise engage in stalling tactics in the course of the rate-setting proceeding.

E. Cable Programming Service Complaint Process.

118. Effective Date of Cable Programming Service Regulation. Several municipalities request that the Commission determine that regulation of cable programming services commences on the date the Commission's regulations take effect, rather than on the date a complaint is filed. We decline to do so. First, we note that Congress intended regulation of cable programming services to be complaint-driven (see 47 U.S.C. §§ 543(c)(1)(B) and 543(c)(3)). The Commission cannot act on cable programming service tier rates until a complaint is filed. Second, insofar as the petitioners are suggesting that the Commission should calculate refund liability back to the effective date of our regulations, Section 623(c)(1)(C) of the Act prohibits the Commission from doing so.[70]

119. NATOA also requests that the Commission grandfather cable programming service complaints filed within 180 days of the effective date of the Commission's regulations for purposes of permitting additional rate decreases after expiration of the 180-day period. NATOA argues that such a provision is necessary to ensure that complainants filing during the 180-day period receive the full reduction in rate to which they are entitled. NATOA's argument references the Commission's prior statement that we would "seek to refine our analysis through further industry surveys and order additional rate reductions if appropriate." Rate Order at 5644.

120. We have decided that complaints that are filed before the effective date of the revised rate regulations adopted in the Second Order on Reconsideration, will be adjudicated as follows: Refunds for the time period in which the old rules were in effect will be based on the old rules, while refunds for the time period in which the new rules are in effect will be based on the new rules. (See discussion at para. 110, *supra*). This approach will achieve for ratepayers the maximum possible benefit from our revised rules consistent with the general prohibition on retroactive rulemaking.[71]

121. Section 623(c)(3) of the Act directs that complaints must be filed "within a reasonable period of time following a change in rates that is initiated after that effective date,

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[70] Section 623(c)(1)(C) requires the Commission to establish procedures for the refund of such portion of the rates paid by subscribers after the filing of a complaint that are found to be unreasonable. 47 U.S.C. § 543(c)(1)(C)("the Commission shall . . . establish . . . the procedures to be used to . . . refund such portion of the rates or charges that were paid by subscribers after the filing of such complaint that are determined to be unreasonable.")

[71] See Bowen v. Georgetown University Hospital, 488 U.S. 468 (1988).

including a change in rates that results from a change in that system's service tiers." 47 U.S.C. § 543(c)(3). In the Rate Order, we interpreted that provision to require complainants to file such complaints within 45 days from the time a subscriber receives a bill from the cable operator that reflects the rate increase. Rate Order, *supra*, at 5840 (emphasis supplied). We clarify that a subscriber may file a complaint any time there is a rate change, including an increase or decrease in rates, or a change in rates that results from a change in a system's service tiers. See 47 U.S.C. § 543(c)(3). Such rate changes may involve implicit rate increases (such as deleting channels from a tier without a corresponding lowering of the rate for that tier).[72] As we stated in the Rate Order, the triggering mechanism for the filing of the complaint will be a reflection of any rate change on a subscriber's monthly bill. Id.[73]

IV. PROVISIONS APPLICABLE TO CABLE SERVICE GENERALLY

122. Introduction. The Rate Order set out a number of regulations generally applicable to all cable systems. These include provisions governing negative option billing practices, prevention of evasions, grandfathering of rate agreements, subscriber bill itemization, advertising of rates, and effective date. Petitioners have challenged and/or sought clarification of the provisions governing evasions, grandfathering of rate agreements, subscriber bill itemization, and the effective date of the rules, and these are discussed below.

A. Negative Option Billing Practices

123. Section 3(f) of the 1992 Cable Act provides:

> A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment.[74]

Unlike other subsections of Section 3, this provision does not specifically delineate the jurisdictional role, if any, of state and local governments in addressing negative option billing practices of cable operators.[75] Language in previous decisions in this proceeding has created confusion concerning this issue. Based on our careful examination of the 1992 Cable Act and its legislative history, as discussed below, we conclude that the Commission as well as state and local governments have concurrent jurisdiction to regulate negative option billing.

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[72] See discussion of implicit rate increases in Rate Order at 5917.

[73] We amend § 76.953(b), accordingly, to reflect this clarification.

[74] Communications Act, Section 623(f), 47 U.S.C. Section 543(f).

[75] Compare Section 3(f) with Section 3(a)(2), (3), providing that local franchising authorities may obtain jurisdiction to regulate basic service tier rates upon certification by the Commission. Communications Act, § 623(a)(2), (3), 47 U.S.C. § 543(a)(2), (3).

124. In the Rate Order the Commission addressed in footnote 1095 an argument by municipalities that state and local governments should have concurrent enforcement powers over negative option billing practices. In response, we stated that "[w]e do not preclude state and local authorities from adopting rules or taking enforcement action relating to basic services or associated equipment consistent with the implementing rules we adopt and their powers under state law to impose penalties."[76] Similarly, on reconsideration we reaffirmed our prior determination in the Rate Order that Section 3(b)(7) of the 1992 Cable Act, which establishes the minimum contents of the basic service tier, preempts franchise agreements that purport to require cable operators to provide basic tier services beyond the statutory minimum requirements.[77] In discussing the basic service tier definition, we stated in footnote 127:

> We similarly affirm that franchising authorities may not regulate tier restructuring in a manner that is inconsistent with the 1992 Cable Act. See Communications Act, Sections 623(a)(1), (f), 47 U.S.C. Sections 543(a)(1), (f). In particular, local authorities are precluded from regulating negative option billing to prevent tier restructuring regardless of how the local requirement is characterized. The Commission has ruled that cable operators may engage in revenue-neutral tier restructuring without violating the negative option billing procedure.[78]

125. These two brief statements did not specifically mention preemption nor were they accompanied by any preemption analysis. Nevertheless, our footnotes may be construed as attempting to preempt states and local franchising authorities from regulating negative option billing in a manner inconsistent with our rate regulation rules generally and our specific rule addressing negative option billing.[79] In fact, we understand that the possible preemptive effect of these statements is at issue in at least two pending lawsuits in federal district courts.[80]

126. Accordingly, on reconsideration on our own motion, we examine in greater detail whether, and under what circumstances, state and local governments have authority to regulate negative option billing practices of cable operators. As discussed below, we conclude that the 1992 Cable Act permits state and local governments to employ state or local consumer protection laws to regulate negative option billing. State and local government jurisdiction to regulate negative option billing under consumer protection laws is concurrent with the Commission's jurisdiction to regulate negative option billing under the Communications Act. Therefore, based on our close examination of the preemption issue in this order, we hereby substitute the following analysis in place of the two statements in our previous orders noted above.

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[76] Rate Order, 8 FCC Rcd 5905 n.1095.

[77] First Rates Reconsideration, *supra*, at paras. 78-86.

[78] Id. at 46 n.127 (internal citation omitted).

[79] See 47 C.F.R. § 76.981.

[80] See Time Warner Cable v. Doyle, Case No. 93 C 0633C (W.D. Wis.); Mauldin v. Time Warner Entertainment Co., L.P., Case No. 93-977-CIV-94L-19 (M.D. Fla.).

127. The negative option billing provision appears in Section 3 of the 1992 Cable Act, the section of the statute governing rate regulation. Unlike most of the other provisions of Section 3, however, the negative option billing provision is not limited in its application to those cable services and cable operators subject to rate regulation. Rather, the unqualified negative option billing prohibition applies to all cable services offered by all cable operators, regardless of whether the operators are subject to effective competition.[81] Moreover, unlike many other provisions of the 1992 Cable Act, the negative option billing provision does not specifically direct the Commission to adopt implementing rules,[82] nor does it specifically vest jurisdiction in the Commission to enforce the provision to the exclusion of state and local governments.

128. While the negative option billing provision is codified in Section 3 governing rate regulation, it appears that it is more in the nature of a consumer protection measure rather than a rate regulation provision per se. In this regard, the negative option billing provision governs the circumstances under which a cable operator may bill a subscriber for a particular service, rather than the reasonableness of the actual rate charged a subscriber for that service.[83] Thus, Section 8 of the 1992 Cable Act regarding consumer protection is relevant to the preemption analysis. Section 8(c)(1) provides that "[n]othing in this title [Title VI] shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the

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[81] The legislative history supports this conclusion. Conference Report at 65 (the prohibition covers, *inter alia*, "individually-priced programs or channels" that are not subject to rate regulation under the 1992 Cable Act); 138 Cong. Rec. S567-68 (daily ed. Jan. 29, 1992) (remarks of Sen. Gorton, sponsor of the provision).

[82] Of course, the Commission has authority to adopt rules to implement the negative option billing provision of the 1992 Cable Act under its general rulemaking power under Sections 303(r) and 4(i) of the Communications Act. Section 303(r) authorizes the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act... ." 47 U.S.C. Section 303(r). Likewise, Section 4(i) provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. Section 154(i). In contrast, as discussed below, state and local government authority to regulate negative option billing does not derive from the 1992 Cable Act or the Communications Act, but rather from state or local consumer protection laws.

[83] The legislative history supports this interpretation. In offering the negative option billing amendment to the Senate cable bill that ultimately became Section 3(f) of the 1992 Cable Act, Senator Gorton referred to negative option billing as a consumer protection issue rather that a rate regulation issue. Specifically, he referred to negative option billing as a "marketing ploy" and said that the provision would make sure that the public is not "duped into paying for any cable service program, service, equipment or anything else, without consciously knowing they are purchasing that service and making a decision to do so." 138 Cong. Rec. S567-68 (daily ed. Jan. 29, 1992) (remarks of Sen. Gorton). Cf. Cable Television Ass'n. of New York, Inc. v. Finneran, 954 F.2d 91 (2d Cir. 1992) (holding that rates charged by cable operators to subscribers wishing to downgrade to a less expensive tier of service are not "rates for the provision of cable service" under the 1984 Cable Act).

extent not specifically preempted by this title."[84] Therefore, given that Section 3(f) appears to be a consumer protection measure, unless "specifically preempted" elsewhere in Title VI, Section 8(c)(1) preserves the ability of a state or local government to exercise any authority it may have under state or local consumer protection laws to regulate negative option billing.[85]

129. We find nothing in Title VI that specifically preempts state or local regulation of negative option billing. There is nothing in the language of Section 3(f) or its legislative history to suggest that the Commission has exclusive jurisdiction over negative option billing or that state and local governments are precluded from addressing such practices. Indeed, in proposing the negative option billing prohibition, Senator Gorton referred to the efforts of state attorneys general in this area.[86] Given congressional recognition of the states' role, it seems reasonable to assume that if Congress intended to supplant state or local efforts in this area, it would have said so specifically.

130. Therefore, reading Sections 3(f) and 8(c)(1) of the 1992 Cable Act together, we conclude that the Commission as well as state and local governments have concurrent jurisdiction to regulate cable operators' negative option billing practices. Our general rulemaking power under Sections 303(r) and 4(i) of the Communications Act authorizes us to adopt rules to implement Section 3(f) of the 1992 Cable Act regarding negative option billing. States and local franchising authorities, by virtue of the preservation of authority under Section 8(c)(1) of the 1992 Cable Act, may regulate negative option billing practices of cable operators to the extent authorized under state or local consumer protection laws.

131. Consistent with this view, we believe that the 1992 Cable Act generally does not preempt state and local governments from regulating negative option billing practices of cable operators under state or local consumer protection law. We note, however, that Section 3(a) of the 1992 Cable Act provides that states and franchising authorities may regulate "the rates for the provision of cable service" only to the extent provided by the statute in accordance with rules

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[84] Communications Act, Section 632(c)(1), 47 U.S.C. Section 552(c)(1).

[85] The Conference Committee adopted the House version of the consumer protection and customer service provision (see Conference Report at 79), so language from the committee report accompanying the House bill that describes this provision is relevant legislative history. That report states:

> [This subsection] makes it clear that nothing in this Title is intended to interfere with the authority of a state or local governmental body to enact and enforce consumer protection laws, to the extent that the exercise of such authority is not specifically preempted by this Title. In adopting this provision, the Committee intends that state and local authorities retain all authority to enact and enforce consumer protection laws that they have under current law.

House Report at 105-106.

[86] 138 Cong. Rec. S567-68 (daily ed. Jan. 29, 1992).

established by the Commission.[87] As explained above, we believe that in typical circumstances regulation of negative option billing does not implicate "rates for the provision of cable service," but rather simply addresses billing practices of cable operators, activity which seems more in the nature of consumer protection than rate regulation. Therefore, we conclude that Section 3(a) of the 1992 Cable Act generally does not "specifically preempt" state and local governments from enacting and enforcing state or local consumer protection laws that may address negative option billing practices of cable operators. Should we become aware of a particular situation, (*e.g.*, through a petition for declaratory ruling), in which state or local regulation of negative option billing goes beyond consumer protection and instead approaches actual regulation of "rates for the provision or cable service," or otherwise goes beyond consumer protection law, we will consider the question of federal preemption in that specific factual context.

B. Prevention of Evasions.

132. The 1992 Cable Act requires the Commission to establish and periodically review regulations to prevent evasion of the rate regulations, including evasion resulting from retiering. 47 U.S.C. § 543(h). The Rate Order defined a prohibited evasion as "any practice or action which avoids the rate regulation provision of the Act or Commission rules contrary to the intent of the Act or its underlying policies." Rate Order at 5915. The Commission generally opted for a case-by-case approach and declined to delineate specific actions that might constitute evasion. Id.[88]

133. Various petitioners urge the Commission to classify certain practices as evasions or to declare that certain actions will not be deemed evasions. In the Rate Order, we stated our belief that it would be virtually impossible to list every potentially evasive practice or to determine that a practice constitutes evasion in the absence of a specific factual context, while expressing our expectation that evasions would be remedied by this Commission and local franchising authorities. Id. at 5915, 5916. While we still may be unable to list all prohibited practices at this time, certain patterns of conduct have emerged since the adoption of the rate regulations that we can characterize as creating, under certain circumstances, a possible evasion of the rate regulation rules. For example, moving groups of programming services that were offered in tiered packages to *a la carte* packages may be considered, in certain circumstances, an attempt to avoid the rate regulation of those services that had traditionally been offered to customers as part of the programming package intended for regulation by Congress. Such practices may not, depending on the particular circumstances, provide subscribers with the realistic option to purchase unregulated channels on an individual basis, a requirement set forth in

[87] Communications Act, §§ 623(a)(1), (2)(A), (3)(A), 47 U.S.C. §§ 543(a)(1), (2)(A), 3(A). See also § 623(b), 47 U.S.C. § 543(b) (Commission directed to prescribe regulations to ensure that rates for the basic service tier are reasonable).

[88] In the Rate Order, the Commission did cite three practices that, if established by the evidence, would constitute evasions. This list, however, was not meant to be an exhaustive delineation of rate regulation evasions, but rather was to serve as the foundation for developing policies in this area. Rate Order at 5917.

the Rate Order.[89] Generally, as discussed in further detail in the Second Order on Reconsideration at Section II C ("*A la carte* packages"), collective offerings of otherwise exempt per channel or per program services will not be considered an evasion if (1) the price for the combined package does not exceed the sum of the individual charges for each component of service, and (2) the cable operator continues to provide the component parts of the package separately (which requirement will be met if the *a la carte* offering constitutes a realistic service choice).[90]

134. Collapsing multiple tiers of service into the basic tier of service, which ultimately eliminates the service choice previously available to customers and that raises the price of cable service for all basic tier subscribers may also be considered an evasion by circumventing the rules intended to reduce the cost of cable service and to provide for the buy-through of only desired services. Upon receipt of a complaint on any potential evasion, we will consider, *inter alia*, such circumstances as the timing of the cable operator's actions (*e.g.*, whether they occurred on the eve of regulation or in response to the filing of a complaint), the price to subscribers before and after the actions, a comparison of the level of service received by the subscriber before and after the cable operator's actions, and whether the action resulted in the avoidance of the tier buy-through prohibition.[91] Practices that have the effect of increasing subscriber choice and/or reducing rates generally will not be found evasive of our rules.

135. Numerous other practices that have developed since the advent of rate regulation might also be found, depending on individual circumstances, to constitute evasions of the rules or to violate the rules themselves. For instance, operators cannot now charge for services previously provided without extra charge (*e.g.*, routine service calls, program guides) unless the value of that service, as now reflected in the new charges, was removed from the base rate number when calculating the reduction in rates necessary to establish reasonable rates. Also, a single channel provided to the customer that may consist of two or more programming services can be counted only as one channel of service provided for rate-setting purposes. Charging customers to downgrade from service packages that were added without their explicit consent, even where those service packages include previously subscribed services, may be a violation or an evasion of the negative option prohibition. In addition, the delivery of new packages themselves (ironically intended to represent subscriber choice) without an affirmative assent from the subscriber may be a violation or an evasion of the negative option requirements and result in

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[89] Id. at 5837, n. 808.

[90] See also interpretive guidelines on whether collective offerings of *a la carte* channels should be accorded regulated or nonregulated treatment, as discussed in Second Order on Reconsideration at Section II C. As noted therein, packages of *a la carte* channels offered prior to April 1, 1993, will be accorded nonregulated treatment.

[91] The "price to subscribers" and "comparison of the level of service" for purposes of determining whether an operator's collective offering of *a la carte* channels should be accorded regulated or nonregulated treatment or will be considered an evasion will be evaluated within the context of the factors set forth in the Second Order on Reconsideration.

a refund to the customer.[92] Adding previously unneeded equipment and charging for that equipment in order to provide customers with the same services they received previously may also be an evasion of our rules. Operators must realize that these and similar practices, and other practices which directly violate or evade our rules will not be permitted, and that sanctions will be imposed in appropriate circumstances.

136. We have now undertaken the first steps of an enforcement effort directed at specific practices by individual operators. The Commission has sent 62 letters of inquiry[93] to various cable operators, primarily in response to complaints from local governments and consumers about rate and service changes and certain other practices. The letters of inquiry generally require the operators to provide information on, and a justification for, recent rate and service changes and practices that were raised by the complaints. Principal subjects addressed in the letters of inquiry include: (1) possible violations of the Commission's freeze on regulated cable service revenues;[94] (2) the removal of programming from existing service tiers and the offering of such programming both on an individual or *a la carte* basis and on a collective or package basis; and (3) possible violations of the negative option billing prohibition.[95] We intend to pursue vigorously these and other appropriate enforcement actions in individual cases to bring the full measure of benefits of the 1992 Cable Act to cable subscribers where the purposes of the Act are being thwarted by the evasive or unlawful actions of cable operators.

C. Grandfathering of Rate Agreements.

137. The 1992 Cable Act's grandfather clause allows a franchising authority with a franchise agreement executed before July 1, 1990, that was regulating basic cable rates at that time to continue such regulation for the remaining term of that agreement without following the Commission's substantive rate standards. 47 U.S.C. § 543(j). The Commission limited this provision to its explicit terms. Rate Order, *supra*, at 5926.

138. King County contends that the grandfather clause should encompass all rate agreements whether executed before or after July 1, 1990 because such agreements may benefit franchising authorities, cable operators, and subscribers. King County's argument was considered and rejected in the Rate Order, where the Commission found that an expansive

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[92] See discussion at para. 124, *supra*.

[93] These letters, dated November 17, 1993, December 13, 1993, and February 22, 1994, and any responses are available for public inspection and duplication in Room 207, 2033 M Street, N.W., Washington, D.C. 20554. (The cable operators were given 30 days to respond to the letters.)

[94] See Freeze Order in MM Docket 92-266, 8 FCC Rcd 2921, 58 FR 17530 (April 5, 1993), clarified, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993), extended, FCC 93-304, 58 FR 33560 (June 18, 1993), extended, FCC 93-494, 58 FR 60141 (November 15, 1993), extended, FCC 94-33 (released February 8, 1994), 59 FR 6901 (February 14, 1994).

[95] 47 U.S.C. § 543(f); 47 C.F.R. 76.981.

interpretation of the grandfather clause conflicted with the literal terms of the provision and with the Cable Act's intent that local franchising agreements are abrogated unless they conform with the Act and the Commission's Rules. Id.[96] King County has presented no justification for departing from the literal terms, and the intent, of the Cable Act, and the interpretation set forth in the Rate Order stands.

D. Subscriber Bill Itemization.

139. Special Taxes. The 1992 Cable Act allows a cable operator to separately identify certain charges on its bill, *i.e.* the amounts of the bill (1) assessed as a franchise fee (as well as the identity of the franchising authority); (2) assessed to satisfy any requirements the franchise agreement imposes on the operator for costs related to public, educational, or governmental (PEG) channels; and (3) attributable to charges a governmental authority imposes on the transaction between the operator and the subscriber. 47 U.S.C. § 542(c). The Rate Order limited the itemization provision to its express terms and found that itemized costs must be direct and verifiable,[97] as well as a reasonable allocation of overhead, and for PEG costs, the sum of the per-channel costs for the number of channels used to meet franchise requirements. Rate Order, *supra* at 5967, 68. The Rate Order also made clear that Section 622(c) does not require operators to undertake itemization of any costs. Id. at 5967. In the Rate Order, the Commission specifically determined that taxes imposed on rights-of-way and also applicable to other utilities would not be part of a franchise fee and thus could not be itemized, and specifically excluded from itemization California's possessory interest tax. Id. at 5968, n. 1399.

140. Several petitioners object to the Commission's exclusion from itemization of the California possessory interest tax and seek itemization for the California utility user tax, contending that both of these taxes are imposed on the transaction between the operator and subscriber and thus squarely within Section 622(c)(3), which allows itemization of charges imposed by a governmental authority on the transaction between operator and subscriber.[98] 47 U.S.C. § 542(c). The California possessory interest tax, InterMedia asserts, purports to be an assessment based only on the fair market rent for the use of the right-of-way but is applied differently to cable systems than to other businesses subject to the tax. It contends that in the cable context, the tax is not based on the value of the right-of-way itself, but on the system's

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[96] Several petitioners urge the Commission to expand the grandfather clause to encompass operator/MDU agreements and operator/franchising authority agreements that address issues other than rates, requiring, for example, provision of certain services on the basic tier. The first of these issues (operator/MDU agreements) is addressed at paras. 21-22, *supra*, and the grandfathering of operator/franchising authority agreements for the provision of certain services on the basic tier was addressed in the First Rates Reconsideration at paras. 78-86.

[97] The House Report states that a cable operator shall itemize "only [the] direct and verifiable costs" associated with the categories of costs the Act specifies and should "not include in itemized costs indirect costs." House Report at 86.

[98] Whether these taxes can be afforded external treatment was discussed in the First Rates Reconsideration, *supra*, at paras. 105-107.

profitability, which is derived from the transactions between the operator and subscribers. California Cable Television Association states that the utility user tax is assessed directly as a percentage of subscriber charges each month.

141. These arguments are essentially the same as those raised by the same parties in conjunction with our recent consideration of whether these same taxes should be afforded treatment as external costs when calculating permissible rates. See First Rates Reconsideration, *supra*, at paras. 103-107. Our analysis in the subscriber bill itemization context will be similar, as well. In considering the application of external treatments, the underlying consideration is the same as it is in determining eligibility for itemization on subscriber bills: whether the particular levy is a tax on the transaction between the operator and subscriber. Compare 47 U.S.C. § 543(b)(2)(C)(v) with § 542(c)(3). With the same record before us as here, we have already found ourselves unable to conclude that the California possessory interest tax is, in every instance, the type of tax that would fit within this characterization. Id. at para. 106. We found that with varying applications of the tax in different jurisdictions within California, different treatments under our rules would pertain from case to case. Where the assessment of the possessory interest tax is directly related to subscriber revenues, such as where the tax is based on a value of intangible assets formula effectively calculated from the operator's income for the provision of cable service, then it could be accorded external cost treatment, and it similarly would be eligible for itemization on subscriber bills. Id. at para. 107. Otherwise it is eligible for neither treatment. As we stated in that earlier decision, we are prepared to afford utility user taxes in California, or any other jurisdiction, the requested treatment if additional evidence regarding their application in specific instances demonstrates such treatment is warranted under this analytical framework.

142. Advertising of Rates. Several petitioners object to the Commission's prohibition on advertising prices for cable service that do not include the amount of franchise fees. Rate Order, *supra* at 5972, n. 1415. Petitioners argue that this decision will require many different prices to be quoted for a system serving multiple franchise areas, thus hindering cross-franchise area marketing efforts. Petitioners dispute the Commission's assertion that allowing operators to advertise a rate for service "plus franchise fees" would confuse subscribers about the cost of cable service, contending that goods are often marketed at a price exclusive of applicable taxes and/or shipping charges.

143. We remain concerned that consumers could be misled as to the cost of cable services by advertisements which do not include complete rates, and cable operators will generally be required to advertise rates that include all costs and fees. However, in those cases where a system covers multiple franchise areas that have differing franchise fees or other franchise costs, different channel line-ups, or have slightly different rate structures, an operator should be permitted some flexibility for efficient advertising that will reasonably advise potential subscribers of the true cost of service. In such circumstances, an operator can advertise a range of fees, or a "fee plus," rate that indicates the core rate plus the range of possible additions,